FOR ARGUMENT

Supreme Court, U.S.
FILED
SEP 27 1979
MICHAEL RODAK, JR., CLERK

No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL.,
PETITIONERS

v.

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondent contends (Resp. Br. 20) that "[t]here is no dispute that this case presents a live, justiciable controversy between the parole board and the unnamed members of the putative class about the legality of the federal parole guidelines." But that is precisely the point in dispute. To be justiciable under Article III of the Constitution, a suit " 'must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Federal courts may not exercise jurisdiction in an action "that cannot affect the rights of litigants in the case before them." *Ibid.* As we demonstrated on pages 21 to 23 of our opening brief, respondent's individual challenge to the parole guidelines unquestionably became moot on his release from prison at the end of his term of imprisonment. No other litigant has been recognized as a party plaintiff in this suit, and the case is therefore moot. An attorney's vigor and interest in continuing his

representation is plainly insufficient to establish a constitutional case or controversy. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976).[1]

But respondent (Resp. Br. 36-38) and *amici* (Am. Br. 27-28) argue that the members of the "putative class" have a cognizable "interest" in the outcome of this litigation. We do not doubt that many federal prisoners may be interested in the resolution of the questions raised by respondent's challenge to the parole guidelines. But these individuals are not now parties to the litigation, nor were they parties at the time respondent's claims became moot or at any other time. Because the district court ruled that the case could not proceed as a class action, the "putative class" never "acquired a legal status separate from the interest asserted by [respondent]," *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), and thus could not "succeed to the adversary position of [respondent] * * * whose claim [became] moot." *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977).

Respondent argues (Resp. Br. 39), however, that the existence of an Article III case or controversy cannot depend on whether or not the district court has certified the requested class action pursuant to the procedures of Fed. R. Civ. P. 23. We do not dispute that the Federal Rules of Civil Procedure neither extend nor limit federal jurisdiction. Fed. R. Civ. P. 82. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978). But our

[1] *Amici* are mistaken in their contention that a constitutional case or controversy is established by an attorney's "vigorous representation of the interests of absentees * * *" (Am. Br. 12). The fact that an attorney vigorously seeks to continue his efforts "cannot alter the fact" that the case is moot. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). If an attorney's vigor sufficed to create jurisdiction, the case or controversy limitation on federal courts would have no meaning.

mootness analysis does not turn on the specific requirements of Rule 23. It is Article III of the Constitution, not Rule 23, that imposes the jurisdictional "case or controversy" requirement. And, under Article III, there is no case or controversy unless the court has before it an "actual dispute[ ] between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974). Rule 23, like several other rules of civil procedure (*e.g.*, Rule 7 (complaint), Rules 19, 20 and 21 (joinder), Rule 22 (interpleader), Rule 24 (intervention), Rule 25 (substitution)), provides uniform procedures for defining the "adverse parties" before the court and thus in determining whether any litigants, or classes, possess a " 'personal stake in the outcome of the controversy' " that satisfies Article III requirements. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976).

Rule 23(c)(1), which was adopted in 1966, provides that the district court shall determine by order whether an action may be brought as a class action. The Rule did not alter the power of the court in this regard but instead made explicit an authority that previously had been implied. See Note, *Proposed Rule 23: Class Actions Reclassified*, 51 Va. L. Rev. 629, 650-651 & n.64 (1965). Before the Rule was adopted, the district courts had to determine whether a case could be brought as a class action, and often they ruled that cases could not proceed as class suits. See, *e.g.*, *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), cert. denied, 311 U.S. 700 (1940); *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), aff'd, 313 F. 2d 637 (5th Cir.), cert. denied, 375 U.S. 951 (1963); *Phillips* v. *Sherman*, 197 F. Supp. 866 (N.D.N.Y. 1961); *Speed* v. *Transamerica Corp.*, 5 F.R.D. 56 (D. Del. 1945); *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703 (E.D. La. 1942). It makes no difference in this case whether the district court denied class treatment under the

pre-1966 practice or under Rule 23(c); the case is moot because, under this Court's consistent rulings, the "putative class" is not an adverse party with a cognizable legal status. See *Sosna* v. *Iowa*, *supra*, 419 U.S. at 399.

This conclusion is supported by the Court's reasoning in *Richardson* v. *Ramirez*, *supra*. In *Richardson*, the California Supreme Court adjudicated a case in which the claims of the individual plaintiffs had expired. Because state courts are not subject to Article III limitations, the California court, unlike a federal court, could "choose to adjudicate [the] controversy simply because of its public importance, and the desirability of a statewide decision." 418 U.S. at 36. Before this Court could exercise jurisdiction over the case, however, it was necessary to determine whether the case presented an "actual dispute[ ] between adverse parties." *Ibid.* The Court concluded that there was no "present dispute" on behalf of the individual claimants in *Richardson* (*ibid.*), but that, because the state court "treated the action as one brought for the benefit of [a] class" (*id.* at 37), the adverse class claims satisfied the case or controversy requirement. *Id.* at 38-40. This was so even though the state's procedures for recognizing class litigants were so disparate from federal procedures that there was "serious doubt" whether the class would have been cognizable as a litigant had the case originated in federal court. *Id.* at 39.[2] Because the class had been

[2] *Amici* mistakenly imply (Am. Br. 25) that the Court held in *Richardson* that the mooting of the named litigants' claims prior to class certification did not moot the case under the case or controversy doctrine. In *Richardson* the class was recognized as a party to the litigation while the case was still pending in the state courts. It was irrelevant for Article III purposes that the state court did not recognize the class as a litigant until after the individuals' claims had expired. For, as the Court held, state courts—unlike federal courts—are not limited by the Article III case or controversy requirement that there be an "actual dispute[] between adverse parties." 418 U.S. at 36. It was only *because* the case was in state, rather than federal, court that the case did not become moot at the expiration of the named litigants' claims prior to class certification. *Ibid.*

recognized as a litigant under the state's procedures before the case reached this Court, the class had "acquired a legal status separate from the interest asserted by [the individual class representative]" (*Sosna* v. *Iowa*, *supra*, 419 U.S. at 399) and thus could "succeed to [an] adverse position" (*Kremens* v. *Bartley*, *supra*, 431 U.S. at 133) when the individual claims became moot. 418 U.S. at 38-40. Accordingly, while Rule 23 and other similar rules of civil procedure are not themselves "jurisdictional," by aligning or excluding parties to the litigation they determine whether the courts have before them "a live dispute between 'live' parties," as Article III requires. *Kremens* v. *Bartley*, *supra*, 431 U.S. at 134 n.15. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 755.

b. Respondent argues (Resp. Br. 40-46) that even though a class was not certified before his individual claims became moot, the case is not moot because the "putative class" is "certifiable" (see also Pet. App. 21a n.43).[3] As we demonstrated on pages 27 to 30 of our

[3] This case does not, as respondent contends (Resp. Br. 47-48), involve such inherently transitory claims that mootness will inevitably intervene before class certification can occur. See *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11. As we noted in our opening brief (Br. 33-34), many prisoners serve lengthy periods of imprisonment and may be expected, in an appropriate case, to present challenges likely to endure for sufficient periods to obtain full review of their claims.

Nor is this a case such as that hypothesized by respondents in *Deposit Guaranty National Bank* v. *Roper*, No. 78-904 (to be argued in tandem with this case), where prolonged, "deliberate conduct designed to avoid review" has rendered moot a succession of class action filings by the expedient of paying the individual claims of the class representatives. As we noted in our opening brief (Br. 30-31 n.20), it is possible that in a situation where the class opponent has undertaken a systematic course of paying the claims of individual litigants promptly on the filing of their federal actions, the class certification issue may avoid mootness as an issue capable of

opening brief, however, the "putative classes" in *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975), and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), were plainly "certifiable" in the district court, but in each case the Court held that the actions were moot because the individual litigants' claims had expired and a "proper class" had not been certified to succeed as an adverse party in the litigation. There being no adverse parties with live claims before the Court, the cases were simply moot.[4]

Jacobs and *Spangler* cannot be distinguished, as respondent suggests (Resp. Br. 41), on the theory that the "certifiability" of the class had not been raised as an issue on appeal in those cases. In both *Jacobs* and *Spangler*, the district court had failed to comply with the formal certification requirements of Rule 23 but nonetheless had

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repetition yet evading review. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). But in this case, and in *Roper* as well, there was ample time to rule and the district court did rule on class certification. Moreover, the Parole Commission plainly has not engaged in "deliberate conduct designed to avoid review" by releasing respondent at the expiration of his criminal sentence.

[4]If, as respondent argues (Resp. Br. 41), the question of mootness in this case turns on whether the putative class is certifiable, it is clear that the case is moot. Respondent's individual claims are moot, and there is therefore no individual litigant with a live claim in this case who could serve as class representative for the purpose of certifying the class. See, *e.g.*, *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403 (1977). The "putative class" is thus not certifiable.

Respondent incorrectly relies (Resp. Br. 44) on *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), for the proposition that this case is not moot because the putative class is "certifiable." In *Craft*, the Court held that the claims of two respondents who sought relief in damages satisfied the case or controversy requirement. The Court noted that, because class certification had been denied, "the existence of a continuing 'case or controversy' depends entirely on the [individuals'] claims * * *." *Id.* at 8.

treated the case as a class action and granted class-wide relief. *Jacobs* v. *Board of School Commissioners*, 349 F. Supp. 605, 611-612 (S.D. Ind. 1972); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 505 (C.D. Cal. 1970). Because class-wide relief had been granted, there was no occasion in either case for the question of class "certifibality" to be raised on appeal by the plaintiffs. If the order granting class-wide relief had become final, the plaintiffs would have obtained all the relief they sought. This Court did not suggest that its decision in *Jacobs* or *Spangler* resulted from the plaintiffs' failure to challenge the propriety of the class certification on appeal from judgments in which they had obtained class-wide relief. To the contrary, the Court made clear that those cases were moot because "only a 'properly certified' class * * * may succeed to the adversary position of a named representative whose claim [became] moot."[5] *Kremens* v. *Bartley*, *supra*, 431 U.S. at 133, quoting *Board of School Commissioners* v. *Jacobs*, *supra*.

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[5]Respondent claims (Resp. Br. 21) that this Court's decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), supports his contention that an individual whose claim is moot has standing to seek review of an adverse class action determination. But as we noted in our opening brief (Br. 37-39), the Court did not address any question of mootness in *McDonald*. Instead, the Court concluded that, on the facts of that case, a settlement that merely implemented a prior judgment on the merits did not preclude the plaintiff from taking an appeal to challenge an adverse class action determination. 432 U.S. at 393 n.14. The Court's conclusion in *McDonald* that the settlement did not foreclose appeal of collateral issues that would in fact amplify her recovery (see *Share* v. *Air Properties G. Inc.*, 538 F. 2d 279, 283 (9th Cir. 1976)) was no doubt aided by the fact that United Airlines conceded that the plaintiff had standing to take the appeal. 432 U.S. at 393. The question whether a prevailing plaintiff has obtained all the relief requested and thus lacks standing to appeal (see 9 *Moore's Federal Practice* para. 203.06, at 716-717 (2d ed. 1975)) is plainly a different inquiry from that presented here—a plaintiff whose claim becomes moot is not entitled to any relief in the federal courts because his claim does not present a case or controversy.

c. Because class certification was denied by the district court and respondent's individual claims have expired, this case is moot. Respondent contends (Resp. Br. 35 n.36), however, that the Court should grant the motion to intervene that has been filed in this Court by five other prisoners. Because this case became moot while it was pending in the court of appeals, however, this Court lacks jurisdiction to grant the motion to intervene. As we noted in our opening brief (Br. 42-43), "intervention may not be allowed to give life to a law suit which does not actually exist * * * [or] breathe new life into an action which [is] no longer justiciable." *Becton* v. *Greene County Board of Education*, 32 F.R.D. 220, 223 (E.D.N.C. 1963).

The cases on which respondent relies (Resp. Br. 35 n. 36) support our contention. For example, in *Fuller* v. *Volk*, 351 F. 2d 323 (3d Cir. 1965), the court observed that "[i]t is well settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Id.* at 328. Accord, *Miller & Miller Auctioneers* v. *G.W. Murphy Industries, Inc.*, 472 F. 2d 893, 895-896 (10th Cir. 1973).[6] Because this case is moot, the motion to intervene must be denied and the case dismissed. *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).

2. Respondent voices numerous criticisms over the manner in which the Commission's parole release guidelines were formulated (Resp. Br. 18-19, 50-82). But the question in this case is not whether these guidelines are the best possible means for ensuring fair and equitable

[6]In *Fuller*, the court held that a motion to intervene may, in the discretion of the district court, be treated as a separate civil action adjudicated independently from the main law suit. In this case too, the action of the intervenors could be instituted by the filing of a separate claim in federal district court. But the filing of that action would not revive the controversy in this case, which became moot upon respondent's release from prison.

parole decisions. The question is, rather, whether the exercise of parole discretion pursuant to the guidelines is unlawful under the Parole Commission and Reorganization Act or the Constitution.

a. Respondent's contention (Resp. Br. 102-105) that the Commission's use of parole guidelines improperly interferes with the judicial sentencing function was rejected by this Court in *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10-11:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.* * *
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> * * *[T]he judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met.

As we noted in our opening brief (Br. 72-74), the authority to grant parole is vested in the Parole Commission exclusively, and the exercise of this authority does not usurp the judicial power. See *United States* v. *Grayson*, 438 U.S. 41, 47 (1978).

b. Respondent repeatedly contends (Resp. Br. 57, 81, 83, 98, 100-101) that the parole guidelines fail to give any

consideration to the prisoner's behavior during confinement, as 18 U.S.C. 4206(a) requires.[7] This is incorrect. The application of the guidelines to each prisoner is expressly "predicated upon good institutional conduct and program performance" (Pet. App. 72a n.1). A prisoner's institutional record is considered at several points in the parole decision-making process. At each prisoner's initial parole hearing, the Commission establishes a "presumptive release date" that, depending on the particular facts of the prisoner's offense and personal history (28 C.F.R. 2.12(b); see *id.* at Section 2.20(c), (d), (e)), will be either before, during, or after the guidelines customary release range.[8] Each prisoner's presumptive release date is expressly contingent upon "good institutional adjustment and program progress." *Id.* at Section 2.20(b). Before a prisoner may be released at his presumptive release date, the Commission must make "an affirmative finding [in a pre-release review] * * * that the prisoner has a continued record of good conduct and a suitable release plan * * *." *Id.* at Section 2.12(d). The Commission's rules provide that "the prisoner's overall institutional record [is to be considered] in determining whether the conditions of a presumptive parole date have been satisfied." *Ibid.* If good institutional performance is not maintained, the prisoner's release date may be

[7]The statute conditions parole release upon a determination by the Commission that the prisoner "has substantially observed the rules of the institution or institutions to which he has been confined * * *." 18 U.S.C. 4206(a).

[8]The current regulations of the Parole Commission are shown at 44 Fed. Reg. 3404-3410, 26540-26552 (1979). Citations to the regulations in this brief are to the current regulations.

deferred.[9] *Id.* at Section 2.14(a)(2)(iii), (b)(2)(ii). If exceptional institutional performance is achieved, the prisoner's release date may be advanced. *Id.* at Section 2.14(a)(2)(ii), (b)(2)(ii).[10] Institutional performance thus remains an important factor in the Commission's parole release decisions.

c. Respondent argues (Resp. Br. 76-77, 99-100) that the parole guidelines are applied "mechanical[ly]" and that the Commission's parole decisions are not made "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner." 18 U.S.C. 4206(a). As we demonstrated in our opening brief (Br. 58-60), however, the parole guidelines are not inflexible. Mitigating or aggravating circumstances relating to a particular offense, as well as institutional performance, may justify a decision outside

[9]A prisoner whose personal history and offense are such that he would ordinarily be released within the guideline range may be removed from guideline consideration because of poor institutional performance. In emphasizing that "the Parole Commission [should] reach a judgment on the institutional behavior of each prospective parolee * * *" (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976)), Congress observed that an "understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons." *Ibid.*

[10]In the Parole Commission's *Guidelines Application Manual* (Dec. 1, 1978), the Commission instructed its hearing officers that "exceptional institutional program achievement" (*id.* at 4.17) is a basis for advancing a prisoner's projected or actual release date. The Commission's statistics reflect that institutional performance is the most frequently cited reason for going below the guidelines and the second most frequently cited reason for going above the guidelines. P. Hoffman and L. DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Fed. Probation 7, 10 (December 1974).

the guidelines' ranges.[11] 28 C.F.R. 2.20(c), (d), (e). The Commission has reserved discretion to depart from the guidelines whenever it concludes that the circumstances so warrant. *Id.* at Section 2.20(c). Moreover, the Commission has generally retained authority to revise or modify the guidelines when appropriate. *Id.* at Section 2.20(g).

Individual case consideration is an essential component of the federal parole system because the Commission must, in each case, scrutinize the particular circumstances of the prisoner and his offense to determine how, if at all, the guidelines are to be applied to him. If the guidelines are found applicable to the prisoner, the Commission must then establish a precise release date within the broad range of customary release dates (*e.g.*, 26-36 months) indicated by the guidelines. If the guidelines are found inapplicable, the Commission must determine what release date, if any, is appropriate on the basis of the particular facts of the prisoner's case. The extensive nature of these individual parole inquiries is illustrated by the fact that, in 1978, approximately 11% of the 13,957 individual decisions to release prisoners on parole deferred the date of release beyond the guideline range. During this same period, approximately 10% of the Commission's decisions granted release before the guideline range. *Report of the United States Parole Commission* 15, 19 (1978).

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[11]Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale consipracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 27 (1976).

d. Respondent argues (Resp. Br. 93-94) that Congress intended to require the Commission to consider sentence length in its discretionary parole decisions. Although the statute by its terms imposes no such requirement, respondent contends that the Conference Report indicates that sentence length should be considered. In particular, respondent relies on the fact that the Report states that the Commission's release decisions will have "the practical effect of balancing differences in sentencing policies and practices between judges and courts." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976).[12]

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[12]Respondent contends (Resp. Br. 101 n.102) that the parole guidelines may not be applied to prisoners sentenced to immediate parole eligibility under 18 U.S.C. 4205(b)(2). But in enacting 18 U.S.C. 4206(a), Congress made clear that the Commission is to apply a uniform set of parole release criteria to all federal prisoners, without distinguishing between prisoners sentenced under different parole eligibility schemes. As the Conference Committee explained, the standards embodied in Section 4206(a) are to be applied by the Commission "in making parole release determinations for federal prisoners who are eligible for parole." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976). Moreover, both the House and Senate versions of the legislation contained a single set of standards for determining whether or not a prisoner should be released on parole. See S. Rep. No. 94-369, 94th Cong., 1st Sess. 23 (1975); H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 5-6 (1975). Indeed, the Senate Report specifically observed that "the standards and criteria are made the same for all federal prisoners without regard to which of the three main sentencing alternatives is utilized by the court." S. Rep. No. 94-369, *supra*, at 18. There is thus no support, in either the language or history of the statute, for respondent's contention that Congress intended different standards to be applied to adult prisoners sentenced under the different statutory sentencing options. See *Izsak* v. *Sigler*, No. 79-2507 (9th Cir. Aug. 28, 1979); *Shahid* v. *Crawford*, 599 F. 2d 666 (5th Cir. 1979).

For the reasons discussed on pages 60 to 72 of our opening brief, respondent's interpretation of the legislative history is incorrect. We note here only that the statement in the Conference Report, on which respondent relies, accurately describes the practical effect of the parole guideline system. The guidelines do not eliminate *all* sentencing disparity. By providing for "fairer and more equitable [parole] decision-making without removing individual case consideration" (28 C.F.R. 2.20(a)), the guidelines do not treat federal prisoners as fungible. The parole guidelines "moderate the disparities in the sentencing practices of individual judges" (*United States* v. *Addonizio*, *supra*, slip op. 10); they do not require all federal prisoners to serve identical sentences.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be disposed of as stated on page 90 of our opening brief.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09